

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE COMMISSIONER OF COMMERCE

In the Matter of the Residential Building
Contractor Application of Mark Allen
Miller, individually, and d/b/a Trade
Group Remodeling, Inc.

**FINDINGS OF FACT,
CONCLUSIONS, AND
RECOMMENDATION**

The above-entitled matter came on for a hearing before Administrative Law Judge Barbara L. Neilson on April 22, 2005, at 9:30 a.m. at the Office of Administrative Hearings in Minneapolis, Minnesota. Christopher M. Kaisershot, Assistant Attorney General, 445 Minnesota Street, Suite 1200, St. Paul, Minnesota 55101-2127, appeared on behalf of the Department of Commerce ("the Department"). Joel R. Fink, Attorney at Law, 9112 Minnehaha Court, St. Louis Park, Minnesota 55426, appeared on behalf of the Respondent, Mark Allen Miller, individually, and doing business as Trade Group Remodeling, Inc. The OAH record closed at the conclusion of the hearing on April 22, 2005.

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Commerce will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact the office of Kevin Murphy, Deputy Commissioner of Commerce, 85 Seventh Place East, Suite 500, St. Paul, Minnesota 55101-2198, for information about the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

STATEMENT OF ISSUES

1. Should the Respondent's application for a residential building contractor's license be denied because he pleaded guilty to felony theft by swindle in 2001?

2. Was the conviction based on underlying conduct that shows that the Respondent is untrustworthy, financially irresponsible, or otherwise incompetent or unqualified to act under a residential building contractor license or engaged in a fraudulent or dishonest practice, in violation of Minn. Stat. §§ 45.027, subd. 7, and 326.91, subd. 1(2) and (6)?

3. Did the conviction directly relate to the occupation of residential building contractor within the meaning of Minn. Stat. § 364.03, subds. 1-2?

4. Did Respondent show competent evidence of sufficient rehabilitation and present fitness to perform the duties of a licensed residential building contractor as required by Minn. Stat. § 364.03, subd. 3?

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Respondent, Mark Allen Miller, individually and doing business as Trade Group Remodeling, Inc., is currently self-employed. He performs small painting jobs as a subcontractor for other companies. He is not presently required to be licensed by the Department, but wishes to become a licensed residential building contractor.^[1]

2. On November 19, 2001, Mr. Miller pleaded guilty to Felony Theft by Swindle.^[2] The criminal complaint alleged that Mr. Miller swindled more than \$65,000 from Galyan's,^[3] a sporting goods store where Mr. Miller had been employed.^[4] Mr. Miller was sentenced to 180 days in the workhouse and three years probation. Imposition of this sentence was stayed, and Mr. Miller instead served four months of house arrest. In addition, the term of his probation was stayed on July 19, 2002. Mr. Miller and others involved in the crime were required to pay full restitution.^[5]

3. Mike Zechmeister, a friend of Mr. Miller who was also charged in the scheme, paid approximately \$31,000 in restitution to the court. Mr. Miller worked out an agreement to repay Mr. Zechmeister for a portion of this amount (approximately \$13,900), and Mr. Zechmeister is satisfied that Mr. Miller has paid his fair share of the restitution.^[6]

4. Mr. Miller's felony conviction was reduced to a misdemeanor on July 19, 2002.^[7]

5. The conduct that led to the conviction occurred while Mr. Miller was employed as a cashier at Galyan's between October 3, 2000, and March 10, 2001. He was 23 years old at the time. Mr. Miller regularly worked at the return desk in the store. After working in Galyan's for several weeks, he observed a flaw in Galyan's system for merchandise returns and conceived the theft scheme. In order to facilitate his scheme, Mr. Miller located merchandise of significant value in the store and committed the 16-digit Uniform Product Code to memory. He also memorized a series of 16-digit credit card numbers, including their expiration dates. Using this information, Mr. Miller would post the value of fictitious returned merchandise to one of the credit card numbers he

had memorized. In order to avoid detection, Mr. Miller assigned different names to the transactions. In an effort to conceal the theft, Mr. Miller altered the names on the return receipts so that they did not match the credit card number. He processed the fraudulent transactions when managers were not present.^[8]

6. The first fraudulent transaction occurred on November 5, 2000. One of the fraudulent transactions (alleging the return of 12 exercise bikes in the amount of \$21,000) occurred on November 21, 2000. When that transaction was detected and a Galyan's manager confronted Mr. Miller about it, Mr. Miller destroyed relevant documents and denied any involvement. On December 10, 2000, Mr. Miller resumed the fraudulent credit card scheme, this time using smaller dollar values in order to avoid detection. The dollar amount of the fraudulent transactions then increased until Mr. Miller was caught on March 10, 2001. Although Mr. Miller knew it was wrong to steal from Galyan's and he did not need the money to make ends meet, he continued to engage in the fraudulent scheme until he was arrested.^[9]

7. Mr. Miller engaged in approximately 72 fraudulent transactions over the period from November 2000 to March 2001. He swindled or attempted to swindle approximately \$68,000 from Galyan's. Mr. Miller thought out his plan to steal from Galyan's and took numerous steps to cover his tracks. He altered names associated with credit cards, created fictitious names in an attempt to hide his actions, did not use his own cards, and processed the fraudulent transactions during periods of time when store supervisors were not present.^[10]

8. Although the credits were issued to charge cards of Mr. Miller's friends and acquaintances and not to Mr. Miller's own cards, Mr. Miller initiated the scheme and was the mastermind.^[11] Mr. Miller admitted that the fraudulent scheme was entirely his idea. He treated one credit card account as a savings account, and his friends gave him money from the accounts to pay his bills.^[12]

9. During March of 2001, Chad Lennon, the assistant store manager, became aware of the alleged return of approximately \$1,000 worth of in-line skates. This was suspicious since it was not in-line skate season and Mr. Lennon could not find the skates in inventory. When Mr. Miller was questioned about the in-line skate return, he stated that had no recollection of the in-line skate return. Mr. Lennon subsequently found that this was a false statement by Mr. Miller.^[13]

10. Dee Jenkins, Galyan's regional loss prevention manager, investigated Mr. Miller after she received a report from Mr. Lennon. The investigation revealed that, although various credit cards had been credited for the value of returned merchandise, the merchandise was not in inventory at Galyan's. A videotape was set up to film Mr. Miller at work. It was discovered that Mr. Miller was making refunds even though there was no merchandise present. Ms. Jenkins' investigation confirmed that there were over 60 separate fraudulent transactions by Mr. Miller totaling over \$65,000. Ms. Jenkins had never seen a case of this magnitude in her 20 years of employment in the retail industry. Mr. Miller actively attempted to conceal his fraudulent activity and initially lied about his involvement when he was first confronted.^[14]

11. The police reports relating to Mr. Miller showed that, in addition to the credit card scheme, Mr. Miller also provided unauthorized discounts to customers of

Galyan's during his employment. In one instance, he discounted \$70 from a \$100 item and, in another instance, he allowed a customer to walk out of the store without paying for merchandise.^[15]

12. The Respondent's application for a residential contractor license was received by the Department on July 20, 2004. Applicants are required to provide background information as part of the application. One of the questions asked whether the applicant or the applicant's qualifying person has "[b]een charged, indicted, pleaded to, or convicted of any criminal offense in any State or Federal Court in the last 10 years," instructs the applicant to include "felonies, gross misdemeanors or misdemeanors" other than traffic violations, and instructs applicants responding "yes" to attach "a written statement, signed and dated by the applicant, explaining the circumstances of each incident." The Respondent answered "yes" to this question and provided a letter and a copy of the case history of the criminal matter. The letter indicated that he plead guilty and was convicted of theft by swindle. Mr. Miller indicated in the letter that this "costly mistake was a lesson in life I took very seriously." He indicated that he has been a law-abiding citizen since his conviction, he started his own company (Trade Group Remodeling Inc.), he passed the State Exam for General Contracting, and he had made attempts to better his life. The letter noted that restitution was paid in full immediately, the charge was reduced from a felony to a misdemeanor, and jail time was replaced with house arrest because this was a first offense. Mr. Miller also indicated that he was in the process of seeking expungement of the criminal conviction.^[16]

13. On July 20, 2004, the same date the application was received by the Department, Mr. Miller filed a motion to expunge the criminal conviction in Hennepin County District Court. Mr. Miller's motion to expunge the conviction was denied on September 20, 2004.^[17]

14. Herman Hauglid, a senior investigator for the Department, received the application from the Respondent, saw the response to the question on the application about criminal charges, and conducted an investigation regarding the reported offense. On October 5, 2005, Mr. Hauglid wrote to the Respondent requesting a copy of the criminal complaint along with Mr. Miller's written explanation for what transpired.^[18]

15. On October 25, 2004, Mr. Miller provided the Department with the four-page criminal complaint relating to his conviction and a two-page case history. He offered to make a copy of the 342-page original police report for the Department upon request.^[19] The Department eventually obtained a copy of the police report from the Minnetonka Police Department.^[20]

16. The Department evaluated the criminal complaint to determine if the allegations would affect the application for a residential contractor's license and determined that the guilty plea to felony theft by swindle brought into question the Respondent's fitness and ability to be a residential contractor. The Department found that the underlying conduct directly related to the occupation of residential contractor, and considered each of the 72 incidents a separate disqualifying fraudulent act by Mr. Miller. The Department ultimately concluded that it would not be in the public's interest to issue a license.^[21]

17. On November 10, 2004, Mr. Hauglid sent another letter to Mr. Miller in which he noted that the Department was recommending the denial of the application based primarily on the conduct that led to the conviction. He notified Mr. Miller of his right to request a contested case hearing before an Administrative Law Judge after the Department issued a statement of charges why the license should not be granted. In the alternative, he offered Mr. Miller an opportunity to withdraw the application.^[22]

18. Respondent declined to withdraw the application and requested a hearing. In his letter, the Respondent noted that he had been a law-abiding, tax-paying citizen since making the mistake that led to his conviction and urged the Department to grant him a license so that he could redeem himself and achieve his goals.^[23] The Department ultimately issued a Notice of and Order for Hearing, Order for Prehearing Conference, Order to Show Cause, and Statement of Charges initiating the present contested case proceeding.^[24]

19. Minnesota citizens rely on licensed residential building contractors for their expertise and advice. It is easy for a dishonest contractor to deceive a customer, particularly if the customer does not understand the construction process. Residential building contractors often have unfettered access to a home and its contents and consequently have numerous opportunities for theft from customers. In addition, substantial down-payments are often made by customers prior to the performance of work, and there is a risk that dishonest contractors will take money or materials for one project and apply them to another project.^[25]

20. Mr. Miller has passed the residential building contractor test and paid the required application fee.^[26]

21. Mr. Miller regrets the conduct that led to his criminal conviction and feels remorse for his actions. Mr. Miller is willing to submit to oversight or other safeguards if he is licensed, such as a probationary period or use of an escrow agent to handle money provided by clients.^[27]

22. The Department has not received any complaints concerning Mr. Miller's work as an unlicensed painter and has not imposed any discipline with respect to him. There is no evidence that Mr. Miller has been accused of any illegal activity before or after the 2001 conviction.^[28]

23. Although Mr. Miller has worked as a single skill, specialized painter with general contractors since 2001, no one from the residential contractor trade testified on Mr. Miller's behalf regarding his honesty, trustworthiness, competency, or character. In addition, no one who has worked with Mr. Miller in other positions he has held since 2001 testified regarding his honesty, trustworthiness, competency, or character.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Commerce are authorized to consider the charges against Respondent under Minn. Stat. §§ 14.50, 45.027, subd. 7, 326.91, and 364.06.

2. Respondent received due, proper and timely notice of the charges against him, and of the time and place of the hearing. This matter is, therefore, properly before the Commissioner and the Administrative Law Judge.

3. The Department has complied with all relevant procedural legal requirements.

4. The burden of proof in this proceeding is on the Respondent to show by a preponderance of the evidence that he should be granted a license in this matter.^[29]

5. The Commissioner of Commerce may deny a license application if the Commissioner finds that it is in the public interest to do so and the applicant either has “violated any law, rule, or order related to the duties and responsibilities entrusted to the [C]ommissioner”^[30] or the applicant has “engaged in an act or practice, whether or not the act or practice directly involves the business for which the person is licensed or authorized, which demonstrates that the applicant or licensee is untrustworthy, financially irresponsible, or otherwise incompetent or unqualified to act under the authority or license” granted by the Commissioner.”^[31] In addition, the Commissioner may deny an application for a residential contractor’s license if the applicant “has engaged in a fraudulent, deceptive, or dishonest practice”^[32] or “has been shown to be incompetent, untrustworthy, or financially irresponsible.”^[33]

6. The Respondent has failed to demonstrate by a preponderance of the evidence that he is not in violation of the provisions cited in Paragraph 5 above.

7. Under Minn. Stat. § 364.03, subd. 1, notwithstanding any other statutory provision to the contrary, “no person shall be . . . disqualified from pursuing, practicing, or engaging in any occupation for which a license is required solely or in part because of a prior conviction of a crime or crimes, unless the crime or crimes for which convicted directly relate to the . . . occupation for which the license is sought.”^[34] In determining whether a conviction directly relates to the occupation for which the license is sought, Minn. Stat. § 264.03, subd. 2, specifies that the licensing authority must consider the following factors:

- (a) the nature and seriousness of the crime or crimes for which the individual was convicted;
- (b) the relationship of the crime or crimes to the purposes of regulating . . . the occupation for which the license is sought;
- (c) the relationship of the crime or crimes to the ability, capacity, and fitness required to perform the duties and discharge the responsibilities of the . . . occupation.

8. The crime of theft by swindle for which the Respondent has been convicted directly relates to licensure as a residential building contractor. This conduct is grounds for denial of a license under the relevant statutes in that it constitutes fraudulent,

deceptive, or dishonest practices and demonstrates that the Respondent is untrustworthy and financially irresponsible.

9. Under Minn. Stat. § 364.03, subd. 3, a person who has been convicted of a crime that directly relates to the occupation for which a license is sought shall not be disqualified from the occupation if the person can show “competent evidence of sufficient rehabilitation and present fitness to perform the duties of the . . . occupation for which the license is sought.” The statute indicates that sufficient evidence of rehabilitation may be established by producing a copy of the local, state, or federal release order and evidence showing that at least one year has elapsed since release without subsequent criminal conviction and compliance with all terms and conditions of probation or parole, or a copy of the discharge order or other documents showing completion of probation or parole supervision. In addition to the documentary evidence presented by the applicant for licensure, the licensing authority is also required by the statute to consider any evidence presented by the applicant relating to the nature and seriousness of the crime for which the person was convicted, all circumstances relative to the crime, including “mitigating circumstances or social conditions surrounding the commission of the crime”; the age of the applicant at the time of the commission of the crime; the length of time that has elapsed since the commission of the crime; and “all other competent evidence of rehabilitation and present fitness presented, including . . . letters of reference by persons who have been in contact with the applicant since the applicant’s release”

10. Respondent failed to produce competent evidence of sufficient rehabilitation and present fitness to perform the duties of a licensed residential building contractor to justify full and unrestricted licensure as a residential building contractor.

11. Minn. Stat. § 45.027, subd. 10, specifies that “Chapter 364 does not apply to an applicant for a license . . . where the underlying conduct on which the conviction is based would be grounds for denial . . . of the license.”

12. These Conclusions are reached for the reasons discussed in the Memorandum below, which is hereby incorporated in these Conclusions.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED: that the Commissioner of the Minnesota Department of Commerce deny Respondent’s application for a residential contractor’s license or, in the alternative, impose appropriate conditions on the Respondent’s license.

Dated: May 23, 2005

s/Barbara L. Neilson

BARBARA L. NEILSON

Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the Agency is required to serve its final decision upon each party and the Administrative Law Judge by first-class mail or as otherwise provided by law.

Reported: Tape Recorded (not transcribed); 3 tapes

MEMORANDUM

In the Notice of and Order for Hearing filed in this matter, the Department alleged that Respondent is not entitled to a residential contractor's license because Mr. Miller engaged in theft by swindle. Mr. Miller does not dispute that he was charged and convicted of felony theft by swindle but argues that his age (23) at the time of the criminal conduct, the passage of time since his guilty plea, the reduction of the sentence from a felony to a misdemeanor, the satisfactory completion of probation as of July 2002, the payment of restitution, and the fact that he has remained law-abiding since the conviction make it appropriate to now issue a residential contractor's license. The Respondent also emphasizes that he truthfully disclosed the conviction on his application, provided relevant information upon request by the Department, and has taken full responsibility for the mistake he made.

The Commissioner's authority to deny a license based on fraudulent or dishonest behavior is not limited to the criminal conviction record. In its investigation of an application, the Department may look at the underlying facts that gave rise to the conviction and determine if the actions taken by the Respondent meet the statutory criteria for denial of the license. The Respondent admitted the theft and described in police records and during the hearing how he intentionally deceived and misled others in order to facilitate his crime. The facts are sufficient to support the conclusion that the Respondent engaged in a practice that was fraudulent, deceptive, dishonest, and demonstrated untrustworthiness.

Under Chapter 364 of the statutes, a person cannot be disqualified from pursuing a licensed occupation due to prior conviction of a crime unless the crime relates directly to the occupation for which the license is sought. Given the financial responsibilities of a residential building contractor, it is evident that a conviction for swindle by theft directly relates to the occupation. The facts are sufficient to support the conclusion that the underlying conduct in which Mr. Miller engaged directly relates to the occupation of residential contractor. It is apparent that Mr. Miller's conduct here involved a scheme that required planning, skill, determination, and a willingness to exploit others. As demonstrated by the testimony of the Department's investigator, licensed residential building contractors have unfettered access to unsophisticated consumers and ample opportunity to misapply funds or misappropriate property. It is important and in the public interest to protect such consumers from unscrupulous contractors.

Minn. Stat. § 364.03, subd. 3, specifies that, even if a person has been convicted of a crime that directly relates to the occupation for which a license is sought, the person shall not be disqualified if he or she can show competent evidence of sufficient

rehabilitation and present fitness to perform the duties of the occupation. The Department argues that Chapter 364 is inapplicable here because Minn. Stat. § 45.027, subd. 10, was later amended to state that Chapter 364 does not apply to an applicant where the underlying conduct on which the conviction is based would be grounds for denial of the license. This appears to reflect legislative intent that an applicant in a case such as this cannot provide evidence of rehabilitation to overcome disqualification from licensure. However, the matter is not free from all doubt since Chapter 364 itself specifies that it applies “[n]otwithstanding any other provision of law to the contrary.”^[35]

In any event, the Administrative Law Judge concludes that Mr. Miller has not provided sufficient evidence of his rehabilitation and present fitness to perform the duties of a licensed building contractor to justify full and unrestricted licensure. It is true that nearly three years has elapsed since Mr. Miller completed his period of house arrest and probation, restitution has been paid with significant help from Mr. Miller’s friends, and it appears that Mr. Miller has complied with terms and conditions of his probation. He has expressed remorse for the mistakes he made, and wishes to proceed to achieve his career goals. He also made a straightforward disclosure of the conviction on his application and cooperated with the Department in providing additional information about the crime. However, the nature and seriousness of the crime for which he was convicted and the circumstances relating to the crime provide reasonable support for denial of the license application. Galyan’s loss prevention manager testified that she has never before seen a case of retail fraud of this magnitude. Mr. Miller was the admitted mastermind of the scheme. He developed a complex plan to defraud a retail establishment after discovering flaws in the store’s procedures for returning merchandise, began to defraud the store only one month after he was hired, and continued to defraud the store until he was terminated and arrested. There were no mitigating circumstances relating to the crime. Mr. Miller did not need the money to make ends meet or to satisfy other pressing obligations, but was merely using the money to pay bills and increase his savings. Moreover, apart from his own testimony, Mr. Miller did not put forward any evidence to show his rehabilitation and present fitness to serve as a licensed residential building contractor. Even though he has been working in various capacities since 2001, including as a painter for general contractors, he did not call witnesses inside or outside the construction trade to testify about his trustworthiness, honesty, competency or financial responsibility, or provide any letters of reference from such individuals.

Under these circumstances, the Department’s denial of the Respondent’s license application is reasonable. In lieu of denying the application, the Respondent suggested at the hearing that it would be appropriate to license him with conditions, such as a probationary period or mandatory use of an escrow agent to handle customer funds. There was no evidence presented at the hearing concerning the feasibility of such an approach. It is recommended as an alternative to denial of the license that the Department consider whether there are conditions that could be imposed on a license issued to the Respondent that would permit the Respondent to prove that he will operate in a trustworthy and financially responsible fashion while still addressing the concerns stemming from the theft conviction and providing the public with appropriate safeguards.

B.L.N.

^[1] Testimony of M. Miller.

^[2] Exhibit C, page 2-3. At the hearing on April 22, 2005, the parties stipulated to the admission of Exhibits A-F.

^[3] Galyan's is now called Dick's Sporting Goods. Since all relevant events occurred while the business was known as Galyan's, that name is used throughout this report.

^[4] Exhibit C, pages 4-6; Testimony of H. Hauglid, M. Miller.

^[5] Testimony of M. Miller, M. Zechmeister; Exhibit C.

^[6] Hearing Tape 1.

^[7] Exhibit C, page 3; Testimony of M. Miller.

^[8] Testimony of M. Miller, C. Lennon, H. Hauglid; D. Jenkins; Exhibit F.

^[9] Exhibit F; Testimony of M. Miller.

^[10] Exhibit F; Testimony of H. Hauglid, D. Jenkins, C. Lennon.

^[11] Testimony of M. Zechmeister, J. Ostenson, and M. Miller.

^[12] Testimony of M. Miller.

^[13] Testimony of M. Miller, C. Lennon, H. Hauglid; D. Jenkins; Exhibit F.

^[14] Testimony of D. Jenkins, M. Miller.

^[15] Exhibit F; Testimony of H. Hauglid.

^[16] Exhibit A, p.3.

^[17] Exhibit C, page 3; Testimony of M. Miller.

^[18] Exhibits B, E; Testimony of H. Hauglid.

^[19] Exhibit C.

^[20] Testimony of H. Hauglid.

^[21] Testimony of H. Hauglid; Exhibit D.

^[22] Id. Mr. Hauglid subsequently received the police reports regarding the theft. Exhibit F.

^[23] Exhibit E.

^[24] Exhibit G.

^[25] Testimony of H. Hauglid.

^[26] Testimony of M. Miller.

^[27] Testimony of M. Miller.

^[28] Testimony of H. Hauglid.

^[29] Minn. R. 1400.7300, subp. 5.

^[30] Minn. Stat. § 45.027, subd. 7(a)(2).

^[31] Minn. Stat. § 45.027, subd. 7(a)(4).

^[32] Minn. Stat. § 326.91, subd 1(2).

^[33] Minn. Stat. § 326.91, subd 1(6).

^[34] See *also* Minn. Stat. § 364.07, which states that the provisions of Minn. Stat. § 364.01 to 364.10 "shall prevail over any other laws and rules which purport to govern the granting . . . of a license . . . on the grounds of conviction of a crime or crimes. In deciding to . . . deny . . . a license, . . . the . . . licensing authority may consider evidence of conviction of a crime or crimes but only in the same manner and to the same effect as provided for in sections 364.01 to 364.10. . . ."

^[35] Minn. Stat. § 364.03, subd. 1.